FILED
NOV 2 1992
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No. 92-577

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EMIL DOPYERA, ET AL.,

Peitioners,

v.

TEXAS STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION,

Respondent.

Brief in Opposition by Respondent, Texas State Department of Highways and Public Transportation

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a decision by the Texas Supreme Court applying state law, the Texas Tort Claims Act, to preclude a federal admiralty claim in Texas state court on grounds of state sovereign immunity, raises a federal question which this Court may hear.

It is the contention of the State of Texas that there are no federal questions presented by Petitioners' Petition for Writ of Certiorari.

LIST OF PARTIES

(1) Texas Department of Transportation, formerly State Department of Highways and Public Transportation

(2) E...il Dopyera

(3) Susan Dopyera

(4) Classic Yacht Charters

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TEXAS STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, formerly the Texas State Department of Highways and Public Transportation, now the Texas Department of Transportation, respectfully prays that Petitioners' Petition for Writ of Certiorari be denied for Want of Jurisdiction.

OPINIONS BELOW

Respondent agrees with Petitioners' reproduction of the opinions below. For the convenience of the Court, the opinion of the Texas Supreme Court in State Department of Highways

v. Dopyera, 35 Tex. Sup. Ct. J. No. 35B (July 1, 1992) is also reproduced in the appendix attached to this Brief in Opposition.

NO JURISDICTION

This case presents no federal question. As explained in the argument of this Brief in Opposition, this case simply involves an interpretation of a Texas state statute by the Texas Supreme Court. Additionally, as explained in the argument of this Brief in Opposition, no conflict with federal authority involving a federal question is presented by this case. Furthermore, since no federal question exists, no conflict with federal authority involving a federal question can exist. Lastly, this case presents no novel procedural or constitutional questions.

Therefore, this Honorable Supreme Court of the United States has no jurisdiction under 28 U.S.C.A. Section 1257(a), formerly 28 U.S.C.A. Section 1257(3), or under Rule 10 of the Rules of the Supreme Court of the United States. Because no jurisdiction exists, this Honorable United States Supreme Court should deny Petitioners' Petition for Writ of Certiorari.

STATUTORY PROVISIONS

Respondent agrees with Petitioners' reproduction of the applicable statutory provisions with the exception of Petitioners' Appendix D, which is a reproduction of previous 28 U.S.C.A. Section 1257 (1948), instead of the recodified 28 U.S.C.A. Section 1257 (1988).

STATEMENT OF THE CASE

Respondent agrees with Petitioners' Statement of the Case with two exceptions. Firstly, Petitioner states in the third sentence of the first paragraph the following:

> Both Plaintiff's original petition and notice letter provided notice that the action was based in

> maritime law, since it concerned damage to a vessel within navigable waters (p. 26a.).

Respondent specifically disagrees with this statement.

Secondly, in the first sentence of the last paragraph of Petitioners' statement of the case Petitioner states the following:

> "On July 1, 1992, the Supreme Court of Texas reversed the judgment of the Court of Appeals, holding that Texas had not waived its sovereign immunity to general maritime jurisdiction and was insulated from liability under the facts of the case."

Respondent would suggest that the following is a more accurate representation of the Statement of the Case as follows:

> On July 1, 1992, the Supreme Court of Texas reversed the judgment of the Court of Appeals, holding that Texas had not waived its sovereign immunity to general maritime jurisdiction, and was insulated from liability **pursuant to the Texas Tort Claims Act as applied to** the facts of the case.

Respondent agrees with the balance of Petitioners' Statement of the Case.

SUMMARY OF THE ARGUMENT

In the case at bar, Petitioners' cause of action involves a maritime injury brought pursuant to the Texas Tort Claims Act. The Petitioners attempt to apply pure comparative negligence principles of general maritime law in place of comparative responsibility principles of Texas state law. The reason is simple. In the event pure comparative negligence principles are applied, Petitioners recover. In the event comparative

responsibility negligence principles are applied, Petitioners do not recover.

The defendant at trial in this case, Respondent, the State of Texas, enjoys the protection of sovereign immunity. Although the State of Texas can waive sovereign immunity protection, in doing so the State of Texas is free to limit the terms of the consent to be sued. In the case at bar, the State of Texas, through the state statute of the Texas Tort Claims Act, has waived sovereign immunity to the extent set forth in the statute.

Unless a federal statute exists that specifically abrogates state sovereign immunity, state sovereign immunity bars federal admiralty law. In the case at bar, no such preemptive federal statute exists. Furthermore, the United States Supreme Court case of Ex parte New York, No. 1, 256 U.S. 490, 497-499, 41 S.Ct. 588, 589-590 (1921) holds that general maritime law does not preempt state sovereign immunity.

In the absence of any preemptive federal statute and in the presence of the state sovereign immunity bar over general maritime law, the issue becomes, "To what extent does the Texas Tort Claims Act waive sovereign immunity?" The Texas Supreme Court is the ultimate interpreter of its own state statute. The Texas Supreme Court in its opinion explains how and why the Texas Tort Claims Act applies comparative responsibility negligence principles, and not pure comparative negligence principles.

This case simply involves a state supreme court interpreting its own state statute. No federal question exists. Therefore, this Honorable United States Supreme Court has no jurisdiction under 28 U.S.C.A. Section 1257(a) and has no jurisdiction under Rule 10 of the Rules of the Supreme Court of the United States. Because no jurisdiction exists, this Honorable United States Supreme Court should deny Petitioners' Petition for Writ of Certiorari.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Argument

It is a fundamental tenet of law that when a state waives sovereign immunity, the state is free to limit the terms of the consent to be sued. This United States Supreme Court in the case of Great Northern Life Insurance Co. v. Read, 322 U.S. 47, 53-54, 64 S.Ct. 873, 876, 88 L.Ed. 1121 (1944) directly states this point of law as follows:

> The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government, while its rigors are mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign. The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedure. (cites omitted.). (emphasis added.).

It is a fundamental tenet of law, that in order to abrogate state sovereign immunity, Congress must make this intention unmistakably clear in the language of any statute enacted by Congress. This Honorable United States Supreme Court in Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243, 105 S.Ct. 3142, 3147-3148, 87 L.Ed.2d 171 (1985) directly addresses this issue as follows:

> Respondent also contends that in enacting the Rehabilitation Act, Congress abrogated the States' constitutional immunity. In making this argument, respondent relies on the pre- and post-enactment legislative history of the Act and

> inferences from general statutory language. **To reach respondent's conclusion, we would have to temper the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court.** *Pennhurst II, supra,* 465 U.S., at 99, 104 S.Ct., at 907; *Quern v. Jordan, supra,* 440 U.S., at 342-345, 99 S.Ct., at 1145-1147. We decline to do so, **and affirm that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute. The fundamental nature of the interests implicated by the Eleventh Amendment dictates this conclusion.** (emphasis added.).

In the case at bar, there is no federal statute preempting the application of Texas comparative responsibility negligence principles. There is also no federal case law that preempts the application of Texas comparative responsibility negligence principles. Quite to the contrary, state sovereign immunity bars general maritime law. This Honorable United States Supreme Court in the case of Ex parte New York, No. 1, 256 U.S. 490, 497-499, 41 S.Ct. 588, 589-590 (1921) states the following:

> It is not inconsistent in principle to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction.

In the absence of any preemptive federal statute and in the presence of the state sovereign immunity bar over general maritime law, the issue becomes, "To what extent does the Texas Tort Claims Act waive state sovereign immunity?" In

the case at bar the Texas Tort Claims Act specifically conditions and limits Petitioners' right of recovery to situations where the employee would be personally liable to the claimant **according to Texas law.** Texas law pursuant to Section 33.001(a) of the Texas Civil Practices and Remedies Code precludes recovery by a claimant who is more that fifty percent (50%) negligent. In the case at bar, the jury found the claimant to be sixty percent (60%) negligent.

The Texas Supreme Court in explaining the Texas Tort Claims Act states the following in its opinion:

> Texas is immune from tort liability except as waived under the Texas Tort Claims Act, which provides in relevant part:
>
> > Section 101.021 Governmental Liability - A governmental unit in the state is liable for: (1) property damage...proximately caused by...the negligence of an employee...if: (A) the damage arises from the operation or use of...motor driven equipment; and (B) the employee would be personally liable...*according to Texas law.*
> >
> > Section 101.025 Waiver of Governmental Immunity: Permission to Sue - (a) Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter. (b) A [claimant] under this chapter may sue a governmental unit *for damages allowed by this chapter.*
> >
> > TEX. CIV. PRAC. & REM. CODE Sections 101.021, 101.025 (emphasis added [in original.]).

> This limited waiver of immunity permits suit against the sovereign only to the extent liability is imposed on an individual by Texas law.

The Texas Supreme Court is the ultimate interpreter of the limits and conditions of the Texas Tort Claims Act for the purpose of determining the extent to which the State of Texas has waived sovereign immunity in the case at bar. The Texas Supreme Court in its opinion explains that the conditions and limitations of the waiver of sovereign immunity by the State of Texas through the Texas Tort Claims Act is only to the extent liability is imposed on an individual by Texas law. Texas law employs comparative responsibility negligence principles, not the pure comparative negligence principles of maritime law.

The Texas Supreme Court has simply interpreted a state statute. No federal question exists. Petitioners are simply dissatisfied with the interpretation of a state statute by a state supreme court. Because no federal question exists, no jurisdiction under 28 U.S.C.A. Section 1257(a) exists. Because no federal question exists, no jurisdiction under Rule 10 of the Rules of the Supreme Court of the United States exists. Therefore, this Honorable United States Supreme Court is without jurisdiction of the case at bar.

Petitioners cite and discuss several cases for the proposition that federal maritime pure comparative negligence principles control in the case at bar. **None of the cases cited or discussed in support of Petitioners' assertion vitiates a State's right to limit its waiver of sovereign immunity through a state statute.** This distinction is critical. Because the State of Texas has sovereign immunity, the State of Texas is liable only to the extent that it has waived sovereign immunity. The Texas Supreme Court has interpreted the Texas Tort Claims Act to preclude a recovery based upon maritime pure comparative negligence principles, because the waiver of

sovereign immunity under the Act is only to the extent liability is imposed on an individual by Texas law. Texas law employs comparative responsibility negligence principles. Pursuant to Texas law, the Petitioners are barred from recovery because the Petitioners were found to be more than fifty percent (50%) negligent by the jury.

Additionally, no conflict involving a federal question exists between this opinion of the Texas Supreme Court and previous opinions by various federal courts. Petitioners claim that the opinion of the Texas Supreme Court conflicts with Kamani v. Port of Houston Authority, 702 F.2d 612 (1983). Quite to the contrary, the opinion of the Texas Supreme Court is consistent with Kamani. The legal issue in Kamani was whether the Texas two year statute of limitations applied or whether the federal three year statute of limitations applied in a maritime injury suit filed pursuant to the Texas Tort Claims Act. In addressing this issue the Fifth Circuit Court of Appeals in Kamani states the following:

> Our recent decision in *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, Her Cargo, Apparel, Tackle, and Furniture, in a Cause of Salvage, Civil and Maritime*, 695 F.2d 893 (5th Cir. 1983), raises considerable doubt as to a conclusion that the state limitations statute automatically is applicable **without any specific indication contained within the statute itself.** (emphasis added.).

Unlike Platoro and Kamani, in the case at bar the Texas Tort Claims Act does contain language specifically indicating the extent of recovery under the Texas Tort Claims Act. As the Texas Supreme Court states in its opinion:

Texas is immune from tort liability except as waived under the Texas Tort Claims Act, which provides in relevant part:

> Section 101.021 Governmental Liability - A governmental unit in the state is liable for: (1) property damage...proximately caused by...the negligence of an employee...if: (A) the damage arises from the operation or use of...motor driven equipment; *and* (B) the employee would be personally liable...*according to Texas law.*
>
> Section 101.025 Waiver of Governmental Immunity: Permission to Sue - (a) Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter. (b) A [claimant] under this chapter may sue a governmental unit *for damages allowed by this chapter.*
>
> TEX. CIV. PRAC. & REM. CODE Sections 101.021, 101.025 (emphasis added [in original.]).

The opinion of the Texas Supreme Court is consisted with Platoro and Kamani. No conflict with federal authority exists.

Petitioners are attempting to select certain benefits from the Texas Tort Claims Act. Petitioners state on page three of their petition, "The Dopyeras alleged that the Department negligently operated and maintained the motor-driven bridge and brought suit under the Texas Tort Claims Act." At the same time, Petitioners are attempting to select the benefits of pure comparative negligence principles from general maritime law,

which are directly contrary to the express limitations of the Texas Tort Claims Act.

Petitioners' attempt to select certain benefits under the Texas Tort Claims Act and simultaneous attempt to select certain benefits under general maritime law have been expressly prohibited by this United States Supreme Court in the case of Tungus v. Skovgaard, 358 U.S. 588, 591-592, 79 S.Ct. 503, 506 (1959). This United States Supreme Court in Tungus states the following:

> The respondent asks us to uphold the interpretation which the majority in the Court of Appeals has put upon the New Jersey statute. Failing that, a much broader alternative argument is advanced--that a court in a case such as this may disregard completely the conditions which the State has put upon the right it has created, and may apply instead the full *corpus* of the maritime law, free of any qualifications imposed by the State. If death occurs upon navigable waters within a State, the argument runs, the law should seize only upon the blunt fact that there is some kind of state statute providing some kind of a right of action for death caused by some kind of tortious conduct. That, it is said, is enough to fill the "void" in the maritime law, which then becomes applicable in all its facets, without further inquiry as to what it is that the State has actually enacted.
>
> **This broad argument must be rejected.** The decisions of this Court long ago established that when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached. This is what was decided in The

> Harrisburg, where the Court's language was unmistakable: "* * * **[I]f the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. * * * The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right."** 119 U.S. 199, at page 214, 7 S.Ct. 140, at page 147. That is the doctrine which has been reiterated by the Court through the years. (cites omitted.). (emphasis added.).

A careful and complete reading of Petitioners' Petition for Writ of Certiorari reveals that Petitioners are foisting the very same argument that has been expressly rejected by this Honorable United States Supreme Court in Tungus. In addition to the fact that no federal question exists in this case, this Honorable United States Supreme Court should also refuse Petitioners' Petition for Writ of Certiorari because Petitioners request relief to which they are not entitled as a matter of law.

Lastly, Petitioners on page twelve of their Petition of Writ for Certiorari state:

> Although the waiver of immunity in *Platoro* involved a legislative waiver, since both *Kamani* and *Mifsud* have held that the TTCA applies to admiralty actions, federal admiralty law clearly applies where it conflicts with state law, as in the instant case.

However, Petitioners have misstated the holdings of those cases. Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, Respondent has a duty and obligation to reveal that this is a misstatement of the law. A complete reading of the Platoro, Kamani, and Mifsud v.

Palisades Geophysical Institute, Inc., 484 F. Supp. 159 (S.D.Tex. - Houston Div. 1980) cases reveals absolutely no authority that vitiates a State's right to limit its waiver of sovereign immunity through a state statute. As the Texas Supreme Court says in its opinion, the Texas Tort Claims Act specifically indicates that recovery under the Act exists "...only to the extent liability is imposed on an individual **by Texas law.**" (emphasis added.).

Furthermore, the extent of Petitioners' misstatement is revealed by the opinion of the Texas Supreme Court as follows:

> The threshold issue is whether the constitutional grant of maritime jurisdiction to the federal government itself preempted state sovereign immunity law. While this is not an Eleventh Amendment case, the Supreme Court long ago addressed and resolved this issue in an Eleventh Amendment context. In *Ex parte New York, No. 1*, 256 U.S. 490 (1921), it was argued that the Eleventh Amendment's immunity refers only to suits "in law or equity," and that suits "in admiralty" could therefore be brought against the states. The Court rejected that argument, reasoning that the Eleventh Amendment is but a recognition of the fundamental principle that a state may not be sued without its consent and that admiralty and maritime jurisdiction was not exempt from that principle. *Ex parte New York, No. 1*, 256 U.S. 490, 497-99 (1921). Further, responding to the argument that allowing a state immunity would destroy the "symmetry and uniformity" of maritime law, the Court wrote:
>
> > It is not inconsistent in principle to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit

> of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction.
>
> *Id. at 503.*

Although state sovereign immunity is not absolute, the Supreme Court has usually required a "clear statement" or "unequivocal expression" of intent to abrogate the immunity in a *statute*. In the maritime law area, the Court held that the Jones Act abrogated state sovereign immunity. In the plurality and concurring opinions in *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468 (1987), the Court held that, as to the Jones Act, a state retains sovereign immunity against suits by its own citizens in federal courts unless it has waived its immunity. The Court subsequently limited *Welch* to its Eleventh Amendment holding, indicating that the Jones Act still does abrogate state sovereign immunity. All the preemption holdings involve intent expressed in a specific statute. There is no suggestion that the holding of *Ex parte New York, No. 1*, that general maritime law does *not* preempt, is not good law.

> We conclude that maritime law does not preempt state sovereign immunity in this cause. First, this is a claim for property damage under general maritime law, *see Reliable Transfer*, 421 U.S. at 411, and not a statutory action for personal injury; **the Dopyeras rely on no federal statute to support their claim. Since there is no statute with a clear expression of congressional intent to abrogate state sovereign immunity, we must not imply one. Second, the last Supreme Court opinion addressing the issue is *Ex parte New York, No. 1*, which held that general maritime law does not preempt state sovereign immunity.** (emphasis in bold added.).

Obviously in the case at bar, general federal admiralty law is barred by state sovereign immunity. The defendant in this case at trial was Respondent, the State of Texas. Sovereign immunity has been waived in the case at bar only to the extent the Texas Tort Claims Act waives sovereign immunity. The Texas Supreme Court is the ultimate authority in interpreting its own state statute. The Texas Supreme Court in its opinion states that the Texas Tort Claims Act specifically indicates that, "This limited waiver of immunity permits suit against the sovereign only to the extent liability is imposed on an individual by Texas law." Texas law employs comparative responsibility negligence principles. Pursuant to Texas law, the Petitioner is barred from recovery, because Petitioner was found to be more that fifty percent (50%) negligent by the jury.

CONCLUSION

This case simply involves an interpretation of a state statute by a state supreme court. No federal question is presented. Petitioners are merely dissatisfied with the interpretation of the Texas statute by the Texas Supreme Court. No conflict with federal authority involving a federal question is presented. Furthermore, since no federal question exists, no conflict with federal authority involving a federal question can exist. Therefore, no jurisdiction under 28 U.S.C.A. Section 1257(a) exists. Therefore, no jurisdiction under Rule 10 of the Rules of the Supreme Court of the United States exists. Because no jurisdiction exists, this Honorable United States Supreme Court should deny Petitioners' Petition for Writ of Certiorari.

This case presents no novel procedural or constitutional questions. Therefore, no jurisdiction under 28 U.S.C.A. Section 1257(a) exists. Therefore, no jurisdiction under Rule 10 of the Rules of the Supreme Court of the United States exists. Because no jurisdiction exists, this Honorable United States Supreme Court should deny Petitioners' Petition for Writ of Certiorari.

Additionally this Honorable United States Supreme Court should deny Petitioners' Petition for Writ of Certiorari, because Petitioners attempt to select certain benefits under the Texas Tort Claims Act and simultaneously attempt to select certain benefits under general maritime law, that are in direct conflict with the Texas Tort Claims Act. **Petitioners' attempt to select is in direct violation of this United States Supreme Court's opinion of Tungus v. Skovgaard, 358 U.S. 588, 591-592, 79 S.Ct. 503, 506 (1959).**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Response of the Texas Department of Transportation was served to counsel for all parties required to be served in compliance with Rule 29 of the Rules of the Supreme Court of The United States by certified mail, return receipt requested on this the _____ day of October, 1992.

_____
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APPENDIX A
IN THE SUPREME COURT OF TEXAS

No. D-0692

THE STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION, PETITIONER

v.

EMIL DOPYERA, ET AL., RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS

OPINION

The issue in this case is whether federal maritime law preempts state sovereign immunity law to require application of maritime's pure comparative negligence principles to an accident at a state-operated drawbridge. The trial court awarded damages under the maritime rule and the court of appeals affirmed. The court of appeals apparently concluded the State of Texas had waived its sovereign immunity and that federal maritime law preempted state law. 799 S.W.2nd 469. We hold the State has not waived its immunity an that Congress did not intend for maritime law to preempt a state's sovereign immunity law in this manner. We reverse the judgment of the lower courts and render judgment for the State.

The Dopyeras sued for property damage resulting from the collision of their charter yacht with a drawbridge owned and operated by the Texas State Department of Highways and Public Transportation.[1] The Dopyeras, alleging the Department negligently operated an maintained the motor-driven bridge, brought suit under the Texas Tort Claims Act.[2] The State raised affirmative defenses of sovereign immunity and contributory negligence.

Trial was to a jury, which found the Dopyeras 60% at fault, the Sate 40% at fault, and total damages of $130,000. The Dopyeras moved for judgment on the verdict, seeking for the first time application of the federal maritime remedy of pure comparative negligence. Texas law as expressed in its comparative responsibility statute provides that in a negligence action, a claimant may recover only if his percentage of responsibility is no more than 50 percent. TEX. CIV. PRAC. & REM.CODE ANN. § 33.001(a) (Vernon Supp. 1991). The trail court applied the maritime rule and awarded the Dopyeras 40% of the damages, or $52,000, plus interest and costs. The Court of appeals affirmed, concluding the State waived its immunity, the federal maritime remedy applied, and the Dopyeras' contributory negligence could only mitigate, not bar, the damage award. 799 S.W.2d 469.

Generally, admiralty jurisdiction extends to vessels on navigable waters, and any tort occurring on those waters and bearing a significant relationship to traditional maritime activity is governed by maritime law. *McCormick V. United State,* 680 F.2d 345, 347 (5th Cir. 1982). A maritime tort claim may be brought in state court pursuant to the "saving to suitors" clause

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[1] While the case was pending on appeal the legislature renamed the agency the Department of Transportation.

[2] TEX. CIV. PRAC. & REM. CODE §§ 101.001-.109. Before codification as chapter 101 of the Civil Practice and Remedies Code, the Tort Claims Act was article 6252-19 of the Revised Civil Statues.

in 28 U.S.C. § 1333 (1986). *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 22-223 (1986)(state courts are constrained by "reverse-Erie doctrine" which requires that substantive state remedies conform to federal maritime standards.) If maritime interests are involved, there is a strong policy to apply uniform rules of maritime conduct and liability to promote and protect maritime commerce. *Pope & Talbot v Hawn,* 346 U.S. 406 (1953).

In the instant case, the court of appeals concluded that maritime law covered the Dopyeras' vessel operating in navigable waters, and that federal law preempted state law. Under federal maritime law's pure comparative negligence standard, when a vessel's captain and one or more other parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is allocated among the parties proportionately to their comparative degree of fault. *Unites States v. Reliable Transfer Co.,* 421 U.S. 397,411 (1795). The court of appeals emphasized the need for a uniform and consistent maritime law system, and the incompatibility of Texas comparative responsibility rule with admiralty's pure comparative rule.

The court of appeals erred by failing to give proper weight to the State's interest in its own sovereign immunity by concluding that federal law preempted the State's limitations on its consent to be sued. Congress has expressed no clear intent to abrogate state sovereign immunity and impose general maritime law on the states for property damage. Moreover, the State's limited waiver of immunity under its Tort Claims Act permits imposition of only the state remedy, and does not allow the broader federal maritime remedy of pure comparative fault.

The threshold issue is whether the constitutional grant of maritime jurisdiction to the federal government itself preempted state sovereign immunity law. While this is not an Eleventh Amendment case, the Supreme Court long ago addressed and resolved this issue in an Eleventh Amendment context. In *Ex*

parte New York, No. 1, 256 U.S. 490 (1921), it was argued that the Eleventh Amendments immunity refers only to suits "in law or equity," a that suits "in admiralty" could therefore be brought against the states. The Court rejected that argument, reasoning that the Eleventh Amendment is but a recognition of the fundamental principle that a state may not be sued without its consent and that admiralty and maritime jurisdiction was not exempt from that principle. *Ex parte New York, No. 1*, U.S. 490. 497-99 (1921). Further, responding to the argument that allowing a state immunity would destroy the "symmetry and uniformity" of maritime law, the Court wrote:

> It is not inconsistent in principle to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction.
>
> *Id.* at 503.

Although state sovereign immunity is not absolute,[3] the Supreme Court has usually required a "clear statement" or " unequivocal expression" of intent of abrogate the immunity in a statute.[4] In the maritime law area, the Court held that the Jones Act[5] abrogated state sovereign immunity.[6] In the plurality and

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[3] *See, e.g. Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)(congressional abrogation of state immunity, pursuant to commerce clause powers); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)(congressional abrogation of state immunity pursuant to enforcement power of section of fourteenth Amendment).

[4] *See, e.g., Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985); *Edelman v. Jordan* 415 U.S. 651 (1974); *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973).

[5] 46 U.S.C. App § 688.

concurring opinions in *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468 (1987), the Court held that, as to the Jones Act, a state retains sovereign immunity against suits by its own citizens in federal courts unless it has waived its immunity. The court subsequently limited Welch to its Eleventh Amendment holding, indicating that the Jones Act still does abrogate state sovereign immunity.[7] All the preemption holdings involve intent expressed in a specific statute. There is no suggestion that the holding of *Ex parte New York No. 1*, that general maritime law does *not* preempt, is not good law.

We conclude that maritime law does not preempt state sovereign immunity in this cause. First, this is a claim for property damage under general maritime law, *see Reliable Transfer,* 421 U.S. at 411, and not a statutory action for personal injury; the Dopyeras rely on no federal statute to support their claim. Since there is no statute with a clear expression of congressional intent to abrogate state sovereign immunity, we must not imply one. Second, the last Supreme Court opinion addressing the issue is *Ex parte New York, No. 1*, which held that general maritime law does not preempt state sovereign immunity.

The issue remains whether Texas itself waived immunity and consented to general maritime law jurisdiction in this cause. If this court concluded waiver was intended the federal courts apparently would defer to that determination. *Welch*, 483 U.S. at 474 (opinion of Powell, Jr.). At least for purposes of Eleventh Amendment construction, the Supreme

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[6] In *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), the Court held that in the Jones Act language ("Any seaman who shall suffer personal injury in the course of his employment") Congress intended to abrogate state immunity as to seamen employed by or injured by a state.

[7] *Hilton v. South Carolina Public Railways Commission*, ___U.S.___, 112 S.Ct. 560 (1991).

Court apparently requires the presence of an unequivocal expression before imposing a holding of waiver. *Port Authority Trans-Hudson Corp. v. Feeney,* 494 U.S ___,___ 110 S.Ct. 1868, 1873 (1990) (Waiver provisions in state act must meet same unmistakably clear standard as Congress's expression of intent to abrogate Eleventh Amendment sovereign immunity). For the reasons that follow, we conclude that under applicable federal construction rules, Texas has not waived it sovereign immunity to general maritime jurisdiction, and the State's limited waiver of sovereign immunity, under state rules of construction, insulates it from liability under the facts of this cause.

Texas is immune from tort liability except as waived under the Texas Tort Claims Act, which provides in relevant part:

> §101.021 Governmental Liability - A governmental unit in the state is liable for: (1) property damage... proximately caused by ... the negligence of an employee...if: (A) the damage arises from the operation or use of...motor driven equipment; *and* (B) the employee would be personally liable ... *according to Texas law.*
>
> §101.025 Waiver of Governmental Immunity: Permission to Sue - (a) Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter. (b) A [claimant] under this chapter may sue a governmental unit *for damages allowed by this chapter.*
>
> TEX. CIV. PRAC. & REM. CODE §§ 101.021, 101.025 (emphasis added).

This limited waiver of immunity permits suit against the sovereign only to the extent liability is imposed on an individual by Texas law. Once the plaintiff invokes the procedural devices of the Texas Tort Claims Act, to bring a cause

of action against the State, then he also is bound by the limitations and remedies provided in the statute. *See Kamani v. Port of Houston,* 702 F.2d 612 616(5th Cir. 1983); *see also Riggle v. State of California,* 577 F.2d 579, 585-86 (9th Cir. 1978). The state is free to limit damages and lability to the terms of its waiver of sovereign immunity, even if the general maritime law conflicts with the liability limitations of the Tort Claims Act. *Trinity River Authority v. Williams,* 689 S.W.2d 883, 886(Tex. 1985). In a cause of action against the State of Texas for property damage resulting from the operation of motor-driven equipment owned and operated by the State, the relief available is limited to that provided by Texas law, and in accordance with Texas' system for apportionment of fault. TEX. CIV. PRAC. & REM. CODE ANN. § 33.001(a) (Vernon Supp. 1991).

We hold that the Dopyeras are bound by the express terms of the sovereign's limited consent to be sued. We reverse the judgment of the court of appeals and render judgment that the Dopyeras take nothing.

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Bob Gammage,
Justice

OPINION DELIVERED: July 1, 1992